Supreme Court, U.S.
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No. 01-

IN THE

# Supreme Court of the United States

RICHARD BARTH,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Whether a district court that resentences a defendant after reversal and remand following an initial sentence may consider evidence at resentencing that was not available at the time of the initial sentencing.

2. Whether Sentencing Guideline § 5K2.19, which took effect on November 1, 2000,

(a) applies to an offense committed in November 1998, and

(b) is authorized by the governing statute and the Constitution.

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No. 01-____

# IN THE
# SUPREME COURT OF THE UNITED STATES

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RICHARD BARTH,

*Petitioner,*

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UNITED STATES OF AMERICA,

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ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE FOURTH CIRCUIT

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## PETITION FOR A WRIT OF CERTIORARI

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## OPINIONS BELOW

The opinion of the court of appeals (2001 WL1231475) (Pet. App. A, pp. 1a - 3a, *infra*) is not reported. The earlier opinion of the court of appeals remanding the case for resentencing (2001 WL 117499) (Pet. App. B., pp. 4a - 16a, *infra*) is also not reported.

## JURISDICTION

The court of appeals issued its decision on October 16, 2001. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

## SENTENCING GUIDELINE INVOLVED

Section 5K2.19 of the Sentencing Guidelines, which took effect on November 1, 2000, provides as follows:

> Post-sentencing rehabilitative efforts, even if exceptional, undertaken by a defendant after imposition of a term of imprisonment for the instant offense are not an appropriate basis for a downward departure when resentencing the defendant for that offense.

## STATEMENT

### 1. Introduction

On September 29, 1999, petitioner pleaded guilty to one count of illegal transportation of child pornography in interstate commerce in violation of 18 U.S.C. § 2252A(a)(1). He was sentenced on February 1, 2000, to a twelve-month sentence of confinement, of which two months was to be served in prison and ten months in home detention, with three years of supervised release to follow the two-month prison term. A fine of $7,500 was also imposed. Petitioner has completed the service of the prescribed period of confinement and paid the fine.

The government appealed the sentence, and on February 12, 2001, the court of appeals reversed and remanded for resentencing. Pet. App. B, pp. 4a - 15a, *infra*.

Prior to the scheduled resentencing, petitioner sought to obtain a current medical report to be submitted for resentencing and to present other evidence relating to events that had occurred after February 1, 2000. The district court held that such evidence could not be presented under the Fourth Circuit's unpublished decision in *United States v. Randall,* 2000 WL 620311 (4th Cir.), *cert. denied on a different issue*, 531 U.S. 906 (2000).[1] The district court then re-sentenced petitioner on May 14, 2001, to a prison term of 17 months, followed by supervised release of two years. The court of appeals affirmed on the basis of its minority rule – which conflicts with the rule in seven other Circuits – that a district court resentencing a defendant may only consider evidence "that it could have heard at the first hearing." Pet. App. A, p. 2a, *infra*.

### 2. The Petitioner

Richard Barth is a 62-year-old man who lived an exemplary, law-abiding life before the events that gave rise to this case. He has been married to Rena Barth for 39 years, and they have three adult children and nine grandchildren. Petitioner moved to the Washington, D.C. area to serve as Data Standards manager for the Office of the Secretary of the United States Senate in 1998. J.A. *I* 63, 135.[2]

### 3. The First Sentencing

Following a sentencing hearing that lasted two days, the district judge granted a downward departure on account of the impact that had been felt by petitioner's daughter and

---

[1] The petition for certiorari that was denied by this Court in *Randall* did not concern the legal issue raised in this petition. It concerned only the enhancement for possession of a firearm.

[2] "J.A. *I*" refers to the Joint Appendix on petitioner's first appeal. "J.A. *II*" refers to the Joint Appendix on petitioner's second appeal.

her family as a result of a statement made by the petitioner during an internet "chat" and because of petitioner's unusual acceptance of responsibility to reduce the harm resulting from the impact of that statement. J.A. *I* 441-43.

The district court imposed a twelve-month sentence, of which two months were to be served in custody and ten months in home confinement, and a $7,500 fine, with a three-year period of supervised release following the original two months' imprisonment.

### 4. The Fourth Circuit's Reversal

The government appealed the sentence, and on February 12, 2001, the court of appeals reversed on the ground that the downward departure was an abuse of discretion. Pet. App. B, pp. 4a - 16a, *infra*. The case was remanded for resentencing. J.A. *II* 7-11.

### 5. Preparation for Resentencing

Petitioner's resentencing was scheduled for April 23, 2001. In preparing for the resentencing, defense counsel sought to interview the psychologist who had been designated by the district court to assist the Probation Office in this case. The defense sought to establish through the psychologist and through other evidence that a downward departure was warranted because petitioner had undergone extraordinary rehabilitation since his initial sentencing on February 1, 2000. The defense advised the court that it was seeking "to determine whether Mr. Barth has successfully undergone extraordinary rehabilitation that would warrant a downward departure at his resentencing." J.A. *II* 15-16.

### 6. The District Judge's Ruling

The district court responded to counsel's request with a letter quoting from the Fourth Circuit's unpublished decision in *United States v. Randall* (Pet. App. C, pp. 17a - 23a, *infra*), the rule that "post-sentencing rehabilitation may [not] be considered to support a departure request when a case is before the trial court for resentencing after remand." J.A. *II* 17. On the rationale of *Randall,* the district court held that the psychologist's testimony would be irrelevant. J.A. *II* 18.

In a responsive letter, defense counsel noted the adoption by the Sentencing Commission of Guideline § 5K2.19, which was effective as of November 1, 2000. The new Guideline prohibits the consideration of extraordinary rehabilitation that has occurred since an original sentencing. Counsel's letter stated: "That new Guideline is also subject to constitutional and statutory challenge." Counsel noted that a recent First Circuit decision (*United States v. Maldonado,* 242 F. 3d 1 (1st Cir. 2001)), had held that the new Guideline would not affect sentencing on offenses committed prior to November 1, 2000. J.A. *II* 20.

### 7. The Resentencing

At a pre-sentencing hearing held on April 30, 2001, the district court ruled (J.A. *II* 32-33):

> Were the Fourth Circuit decision in *Randall* published, this discussion would be unnecessary and we wouldn't have had it. The *Randall* decision is not a published decision, although in my view it was a deliberate decision by the Panel in that case.

> Usually unpublished decisions lack precedential value, in part because there is a less discussion of the issues then there is in a published decision.
>
> This one, however, appears to me to be weightier than the unpublished title would otherwise reveal. And while I understand that I am not, it is not precedent in the same sense that a published decision is, I am going to follow it and determine that in this circuit, both before November 1st of 2000 and after, the trial court is directed not to consider events post original sentencing when a case is on remand for resentencing, and for that reason I find it inappropriate even to consider authorizing an interview with Dr. Tadesse.

At the resentencing on May 14, 2001, the district judge said (J.A. *II* 158-59):

> Mr. Barth is before the Court again for sentencing on the single count of illegal transportation of child pornography in interstate commerce by a computer. The case is before the Court on remand from the Fourth Circuit for resentencing after that Court determined that the basis I identified for departure was not permitted.
>
> Based upon discussions we had in court the last time, I concluded that I would not allow the defense to present evidence seeking a departure based upon post sentencing rehabilitation. I concluded that the Fourth Circuit's unpublished decision in *Randall,*

while not technically binding, was certainly powerful authority that I would follow.

There are other courts that disagreed with the Fourth Circuit's position, and I will admit to some conflict in my own view as to what the appropriate resolution of that issue should have been, or should be.

Other defendants don't have an opportunity for resentencing and, therefore, cannot bring to a court's attention, to the sentencing court's attention, similar possible rehabilitation post sentencing in order to obtain reductions in sentence. So I'm not all together adverse to the result here in the Fourth Circuit.

The Sentencing Commission has, since this original sentencing, adopted the Fourth Circuit's position, and I'm not aware of any constitutional challenge to it. That issue will have to be resolved by appellate courts, however, and I precluded the defendant from putting on any evidence.

I need to make a couple of other remarks. There are some proffers in the papers as to what the defense would put on were that issue available. There is other information, however, that has not been available and cannot be, given my ruling. The Defendant has been seeing a counselor as a condition of supervised release, and because of the restrictions the Probation Office puts on contacting that provider absent court order, Mr. Lewin has not been able to develop any

> additional information concerning post sentencing rehabilitation.
>
> Given my view of the legal situation, I did not find it appropriate to allow that contact to take place in order to make a fuller proffer. So the record is simply silent on that and will remain that way for the time being.

The district court then sentenced petitioner pursuant to a level-18 sentence under the Guidelines. Because of the acknowledged conflict between the Fourth Circuit's unpublished panel decision in *Randall* and the decisions of at least four other Circuits, the district court granted release pending appeal. J.A. *II* 173-74.

### 8. The Second Court of Appeals Decision

The Fourth Circuit affirmed in an unpublished *per curiam* decision. Although it did not explicitly acknowledge the circuit conflict, the Fourth Circuit panel repeated its minority rule that "at resentencing upon a remand the district court may only consider relevant evidence 'that it could have heard at the first hearing' with respect to any particular issue." Pet. App. A, p. 2a, *infra*. On this ground, the court of appeals held that "the district court properly ruled that it was without authority to consider a downward departure based on post-sentencing rehabilitation," and it affirmed the district court's sentence.

## REASONS FOR GRANTING THE WRIT

### 1. *There Is a 7-to-3 Conflict Among Ten Circuits over the Admissibility on Resentencing of Evidence Relating to Conduct After an Initial Sentencing.*

The Fourth Circuit approved the exclusion of evidence that would not have been available at the time of petitioner's first sentencing based on the Fourth Circuit's minority rule that only evidence that the district court "could have heard at the first hearing" is admissible at a resentencing. In its unpublished opinion in *United States v. Randall,* Pet. App. C, pp. 16a - 23a *infra*, the Fourth Circuit applied this rule (which was also endorsed by the Eighth and Tenth Circuits) and added (Pet. App. C, p. 21a *infa*):

> A number of circuits have reached the opposite conclusion, holding that post-sentencing rehabilitation may be the basis for a departure upon resentencing, but we do not find these decisions persuasive. *See United States v. Green*, 152 F.3d 1202, 1207-08 (9th Cir. 1998); *United States v. Rhodes*, 145 F.3d 1375, 1377-82 (D.C. Cir. 1998); *United States v. Core*, 125 F.3d 74, 76-79 (2d Cir. 1997); *United States v. Sally*, 116 F.3d 76, 80 (3d Cir. 1997).

The Fourth Circuit's *Randall* panel acknowledged in its opinion that the result it reached conflicted with the cited decisions of the Second, Third, Ninth and D.C. Circuits. The reasoning for the four other Circuits in the cited cases justified the result those Circuits reached. The reasoning of the four cited Circuits is, we submit, more persuasive than the rationale of the *Randall* decision.

In *Sally*, the Third Circuit asked the parties to brief "whether post-conviction rehabilitation is an appropriate basis for a downward departure." 116 F.3d at 78. The Third Circuit then held in *Sally* that an accused's post-offense rehabilitation, including conduct which occurs after conviction, may warrant a downward departure provided that the efforts are "so exceptional as to remove the particular case from the heartland in which the acceptance of responsibility guideline was intended to apply." 116 F.3d at 80.

The Second Circuit held in *Core* that post-conviction rehabilitation in prison could be grounds for a downward departure at a resentencing. It held explicitly that there is "no significant difference" between post-offense rehabilitation that precedes an original sentencing and "rehabilitation achieved in prison between imposition of the original sentence and resentencing." 125 F.3d at 77.

In a lengthy opinion in *Rhodes*, the D.C. Circuit rejected the argument that it is inequitable to permit downward departures for post-sentencing rehabilitation for defendants who are "lucky enough" to have an opportunity for resentencing following an appeal. The D.C. Circuit said (145 F.3d at 1381):

> Any disparity that might result from allowing the district court to consider post-conviction rehabilitation, however, flows not from Rhodes being "lucky enough" to be resentenced, or from some "random" event . . . but rather from the reversal of his section 924(c) conviction. The Sentencing Reform Act seeks to eliminate not *all* sentencing disparities, but only "unwarranted" disparities. . . .

> Distinguishing between prisoners whose convictions are reversed on appeal and all other prisoners hardly seems "unwarranted."

The Ninth Circuit's opinion in *Green* affirmed a downward departure based on extraordinary rehabilitation during the defendant's stay in prison between his original sentencing and a resentencing. The Ninth Circuit relied on the Second Circuit's decision in *Core* and on the D.C. Circuit's decision in *Rhodes*. 152 F.3d at 1207. It said (152 F.3d at 1207-08; footnote omitted):

> Like the Second Circuit, we cannot ascertain any meaningful distinction between post-offense and post-sentencing rehabilitation. Nor is there support in the Guidelines for the proposition that a court is forbidden from looking at a defendant's rehabilitative efforts upon resentencing.

The Second Circuit reaffirmed its holding in *Core* when it decided *United States v. Bryson*, 229 F.3d 425 (2d Cir. 2000). Although it rejected in *Bryson* the defendant's request for a downward departure because "the findings in the district court were wholly insufficient to support a downward departure for an extraordinary rehabilitation," the Second Circuit said (229 F.3d at 426):

> We did not foreclose the possibility -- however remote -- of a rehabilitation that might occur between our decision and the resentencing. This Court has consistently held that a court's duty is always to sentence the defendant as he stands before the court on the day of sentencing.

Three other Circuits have joined the dispute over consideration of post-sentencing rehabilitation since the Fourth Circuit's *Randall* decision. All have disagreed with the Fourth Circuit's result and have authorized downward departures based on post-sentencing rehabilitation.

In *United States v. Maldonado*, 242 F.3d 1 (1st Cir. 2001), the First Circuit vacated a sentence that had been based on an impermissible ground for a downward departure (*i.e.*, likely deportation), but it authorized the District Court to consider post-sentencing rehabilitation at the time of resentencing. It said (242 F.3d at 5, footnote omitted):

> In the past, this circuit and others have held that a district court may depart downward in resentencing because of *extraordinary* circumstances reflecting rehabilitation after an earlier (now vacated) sentence for the same crime.

In *United States v. Cook*, 238 F.3d 786 (6th Cir. 2001), the Sixth Circuit held that "[a] district court may grant a downward departure on the basis of post-sentence rehabilitation at a resentencing." 238 F.3d at 791. This decision effectively reaffirmed the Sixth Circuit's holding in *United States v. Rudolph*, 190 F.3d 720 (6th Cir. 1999) where the court noted that "it makes no sense to preclude a sentencing judge from considering facts pertinent to resentencing that had not yet arisen at the time of the original sentence." 190 F.3d at 724, quoting with approval from *United States v. Hasam*, 41 F. Supp. 2d 1004, 1020 (D. Neb. 1999).

And in *United States v. Buckley*, 251 F.3d 668 (7th Cir. 2001), the Seventh Circuit (per Posner, C.J.) held that its remand following the reversal of an earlier sentencing "did

not preclude the judge's consideration of extraordinary unforeseen events occurring after the original sentencing, events not before us when we remanded the case, to the extent they bore on the sentence." 251 F.3d at 670.

The weight of the Circuit Court precedents is, therefore, strongly against the Fourth Circuit's rule. The only Circuits that have agreed with the Fourth Circuit's holding are the Eighth and Tenth Circuits in *United States v. Sims*, 174 F.3d 911, 913 (8th Cir. 1999), and in *United States v. Warner*, 43 F.3d 1335, 1340 (10th Cir. 1994).[3] Neither of these opinions adds anything to the Fourth Circuit's rationale and, we submit, the reasoning of the seven Circuits that permit a district court to consider post-sentencing evidence is more persuasive.

***2. The New Sentencing Guideline Is, By Its Own Terms, Inapplicable to this Case and Cannot Foreclose Consideration of Relevant Sentencing Evidence.***

The court of appeals did not rely, in its affirmance of petitioner's sentence, on Sentencing Guideline § 5K2.19, which took effect on November 1, 2000. The First Circuit had refused to apply that new provision in *United States v. Maldonado*, 242 F.3d 1, 5 (1st Cir. 2001), holding that "when the guidelines have been made more severe in the interim, the version in effect at the time of the crime is normally used, as a matter of policy and to avoid any hint of ex post facto increase in penalty." In this case, the offense was committed in November 1998 -- two years before the effective date of § 5K2.19 -- and petitioner was initially

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[3] In *United States v. Mesa*, 247 F.3d 1165 (11th Cir. 2001), the Eleventh Circuit held that *all* rehabilitation -- even before an initial sentencing -- may be considered *only* in determining a defendant's criminal history.

sentenced on February 1, 2000 -- nine months before the new provision's effective date.

Moreover, the Sentencing Commission is authorized by 28 U.S.C. § 994 to prescribe guidelines and policy statements for the use of a sentencing court, but the Commission is not authorized by law to prescribe an arbitrary cut-off date for events relating to a defendant's personal circumstances. Specifically, subsection (d) of 28 U.S.C. § 994 enumerates the "matters, among others, with respect to a defendant" that may be specified by the Commission as having relevance to the severity of a sentence. At no point in subsection (d) or in any other section of the law creating the Commission is the Commission authorized to declare, as Guideline § 5K2.19 now does, that a consideration may be relevant if it occurs prior to an initial sentencing but is to be disregarded at a resentencing. That statement is an arbitrary limitation on a sentencing court's consideration of evidence that the Commission otherwise deems "relevant."

Indeed, the Commentary provided by the Sentencing Commission when it adopted the new Guideline explicitly notes that the amendment "does not restrict departures based on extraordinary post-offense rehabilitative efforts prior to sentencing" because "[s]uch departures have been allowed by every circuit that has ruled on the matter post-*Koon*." Hence the Commission has concurred with the courts that post-offense rehabilitation is a relevant and permissible ground for a downward departure. The Commission cannot exclude such evidence because it occurs after an original sentencing.

The Commission's rejection of relevant evidence of rehabilitation that occurs after an initial sentencing is based on two insupportable premises stated in the "Background

Commentary" -- that "such a departure would (1) be inconsistent with the policies established by Congress under 18 U.S.C. § 3624(b) and other statutory provisions for reducing the time to be served by an imprisoned person; and (2) inequitably benefit only those who gain the opportunity to be resentenced de novo." Section 3624(b) relates to credits that a prisoner may receive to enable him to be released from prison earlier than the prescribed release date under an announced sentence. The Commission apparently considers the "extraordinary rehabilitation" that warrants a downward departure as equivalent to the "good-time" or other in-prison credits that a prisoner can earn. But not all post-sentencing "extraordinary rehabilitation" occurs in prison and is covered by 18 U.S.C. § 3624(b). Indeed, the evidence sought in this case did not concern conduct while petitioner was in prison. And the kind of "extraordinary rehabilitation" that is presented in this case -- resulting from medical treatment and on-the-job conduct by the defendant -- is simply not covered by the Bureau of Prisons programs that concern early release.

The Commission's second reason -- that it is unfair to defendants who are not resentenced to permit post-sentence "extraordinary rehabilitation" to be considered at a resentencing -- is rebutted by the reasoning of the *Core*, *Rhodes* and *Green* decisions. A defendant who is resentenced because there has been a flaw in his original sentencing is entitled to be judged as he stands before the court when sentence is pronounced. If, as the Second Circuit noted in *Core*, the defendant has assisted the government in some other prosecution after his original sentencing, that factor may certainly be taken into account at a resentencing. If the defendant's personal circumstances have changed radically after his initial sentence -- if, for example, his health has precipitously become precarious -- a sentencing court should surely be able to take that recent factor into

account. And if his rehabilitation has been extraordinary in the period preceding resentencing, it is not "inequitable" to remove the judge's blinders and permit him or her to take account of that changed condition when determining the sentence.

Indeed, refusing to allow evidence because it relates to conduct after an initial sentence violates protections afforded by the constitutional Due Process and Equal Protection Clauses. If a trial judge were to refuse to consider a defendant's current circumstances and were to sentence only on facts that are five years old, it would be plain that the sentencing violates minimal due process standards. Defendants whose initial sentences are defective and must, therefore, be resentenced are arbitrarily denied the opportunity to present their current circumstances to the sentencing court -- a right that is afforded to all defendants who are being sentenced for the first time. Excluding evidence of extraordinary rehabilitation because it has occurred recently, after an initial sentencing, is impermissible under governing constitutional standards of Due Process and Equal Protection.

## CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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JANUARY 2002

# APPENDICES

**APPENDIX A**

**UNITED STATES COURT OF APPEALS**

**FOR THE FOURTH CIRCUIT**

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**United States of America,**

**Plaintiff-Appellee,**

**v.**

**Richard S. Barth,**

**Defendant-Appellant.**

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No. 01-4370

2001 WL 1231475 (4th Cir. (Md.))

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Submitted Sept. 13, 2001.
Decided Oct. 16, 2001.

Appeal from the United States District Court for the District of Maryland, at Greenbelt. Deborah K. Chasanow, District Judge. (CR-99-310-DKC).

Nathan Lewin, Alyza D. Lewin, Noam B. Fischman, Mintz, Levin, Cohn, Ferris, Glovsky & Popeo, P.C., Washington, DC, for appellant.

Stephen J. Schenning, United States Attorney, Sandra Wilkinson, Assistant United States Attorney, Greenbelt, MD, for appellee.

Before NIEMEYER, WILLIAMS, and KING, Circuit JJ.

## OPINION

**PER CURIAM.**

Appellant Richard Barth pled guilty to illegal transportation, by computer, of child pornography in interstate commerce. The Government appealed his sentence, arguing that the district court erred in granting a downward departure based on the impact Barth's conviction had on his daughter and her family. This Court agreed with the Government, and vacated Barth's sentence and remanded for resentencing. *United States v. Barth,* 2001 WL 117499 (4th Cir. Feb. 12, 2001) (No. 00-4172) (unpublished). At resentencing, Barth moved for a downward departure based upon his post-sentence rehabilitation and his family circumstances. The district court found that it did not have the authority at resentencing to consider a downward departure based upon post-sentencing rehabilitation. The court further found, as it did at the initial sentencing, that a downward departure based on family circumstances was not warranted. Finding no reversible error, we affirm.

In *United States v. Bell,* 5 F.3d 64, 67 (4th Cir.1993), this Court found that at resentencing upon a remand the district court may only consider relevant evidence "'that it could have heard at the first hearing'" with respect to any particular issue. *Id.* (quoting *United States v. Cornelius,* 968 F.2d 703, 705 (8th Cir.1992)). Thus, we find the district court properly ruled that it was without authority to consider a downward departure based on post-sentencing rehabilitation. We will not review the district court's decision not to depart based on family circumstances. *United States v. Edwards,* 188 F.3d 230, 238-39 (4th Cir.1999).

Accordingly, we affirm the district court's sentence. We dispense with oral argument because the facts and legal

contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

*AFFIRMED.*

**APPENDIX B**

**UNITED STATES COURT OF APPEALS**

**FOR THE FOURTH CIRCUIT**

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**United States of America,**

**Plaintiff-Appellant,**

**v.**

**Richard S. Barth,**

**Defendant-Appellee.**

---

No. 00-4172

3 Fed.Appx. 89, 2001 WL 117499 (4th Cir. (Md.))

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Argued Nov. 3, 2000.
Decided Feb. 12, 2001.

ARGUED: Sandra Wilkinson, Assistant United States Attorney, Greenbelt, MD, for appellant. Nathan Lewin, Miller, Cassidy, Larroca & Lewin, L.L.P., Washington, DC, for appellee. ON BRIEF: Lynne A. Battaglia, United States Attorney, Greenbelt, MD, for appellant. Jennifer M. O'Connor, Miller, Cassidy, Larroca & Lewin, L.L.P., Washington, DC, for appellee.

Before NIEMEYER and KING, Circuit Judges., and SEYMOUR, United States District Judge for the District of South Carolina, sitting by designation.

## OPINION

**PER CURIAM.**

The Government appeals the sentence imposed on Richard Barth for his conviction in the District of Maryland, pursuant to his guilty plea, for violating 18 U.S.C. § 2252A(a)(1) (illegal transportation, by computer, of child pornography in interstate commerce). We possess jurisdiction under 18 U.S.C. § 3742(b) and 28 U.S.C. § 1291. For the reasons set forth below, we vacate Barth's sentence and remand for resentencing.

I.

Richard Barth is a sixty-year-old father and grandfather, formerly employed by the federal government as a data standards manager. Under the plea agreement between Barth and the Government, the parties stipulated to the following events:

> In or about November 1998, Barth entered an Internet chatroom regarding "dad and daughter sex". Barth began communicating electronically via Internet Relay Chat (IRC) with a user using the screen name "beth15" whose profile included the fact that she was living in Illinois. During the course of their communications, Barth transmitted child pornography to "beth15" from his computer in Maryland to a computer in Illinois. One of the transmissions occurred on November 2, 1998. In subsequent electronic communications, Barth suggested that he and "beth15" meet for the purpose of engaging in sexual conduct. "Beth15" indicated to Barth that she was 14 years old. The meeting was scheduled in Chicago,

Illinois because Barth would be traveling from Maryland for purposes of attending a work related conference.

On or about November 12, 1998, Barth canceled the meeting with "beth15" stating in his transmission to her that he was being "watched" for "sexual improprieties" at his place of employment. According to Barth, he had previously scheduled a meeting with a business colleague at the same time and contends that he never had any actual intention of meeting "beth15." Barth made the business trip to Chicago.

On or about November 17, 1998, Barth was arrested in Chicago, Illinois. After being advised of his constitutional rights, Barth admitted to transmitting child pornography to "beth15" and that he had a collection of child pornography on the computer in the basement of his home.

On or about November 18, 1998, a consent search was conducted of Barth's home and a computer was seized. Hundreds of images of child pornography were identified on the computer, many of which involved a prepubescent minor or a minor under the age of twelve years. The government contends that images of sadistic and masochistic conduct or other depictions of violence were also found.

J.A. 8.

At Barth's sentencing, the Government provided evidence that in the course of exchanging pornography over the Internet, Barth engaged in sexually explicit chat. For instance, while communicating with "beth15," Barth expressed his desire to have sex with her, made repeated and graphic references to his genitals and her genitals, suggested that she smoke marijuana and drink alcohol, and, most importantly, made plans to meet her for the specific purpose of having sexual intercourse with her. Barth also urged her to keep the chat and visual images away from her family and the police.

More disturbingly, in their search of Barth's home computer, law enforcement officers found electronic conversations -- with "beth15" and others -- in which Barth boasted of raping his own granddaughter. For example, he wrote to "april12": "i did my 8 y/o granddaughter." J.A 475.[4] On various occasions, he described performing sexual acts on the child, including but not limited to performing oral sex and inserting his fingers into her vagina. In the course of these conversations, Barth gave accurate and specific information about himself, including identifying information about his job, family background, and physical appearance.

Investigators followed up on these horrific disclosures. Upon confirming that Barth, in fact, had an eight-year-old granddaughter in New York, the FBI contacted the local authorities. The New York Administration on Children's Services interviewed the granddaughter and her parents, and it subsequently filed petitions in a New York family court seeking to have the granddaughter and her siblings declared abused children and placed in the state's protective custody. The petitions for

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[4] Suffice it to say that Barth elaborated on his claim--that he "did" his granddaughter--in excruciatingly graphic language.

custody identified not only Barth as an abuser, but also similarly identified the children's parents for failing to protect them from Barth's sexual abuse.

The ensuing New York investigation established that none of the sexual acts described by Barth had actually occurred, thus concluding that the allegations of sexual abuse were "unfounded." Barth voluntarily settled the New York proceedings by agreeing to a protective order which prevented him from having unsupervised contact with any of his grandchildren for one year.

Barth then entered his guilty plea to a criminal information, in which the United States Attorney charged him with violating 18 U.S.C. § 2252A(a)(1). At his sentencing, Barth proffered a series of specific grounds on which he sought downward departure; more generally, he emphasized the traumatic nature of the New York investigation, especially insofar as it implicated his daughter's family. The district court proved receptive to this entreaty, awarding Barth an eight point downward departure, which brought him from Level 18 to Level 10 under the Guidelines.[5] The district court justified this departure as follows:

> It is one thing for a defendant to have to face the consequences himself in terms of prison, if that is what it is, probation, a fine, what have you. In my experience, it is quite

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[5] Though receptive to Barth's request for leniency, the district court rejected each of the factual grounds on which he had sought a downward departure. Indeed, the court made specific findings that Barth did not suffer from diminished mental capacity, J.A. 440, that his conduct was not aberrational, J.A. 437, that his charitable and community service were not "out of the ordinary," J.A. 437, that his acceptance of responsibility was not "extraordinary," J.A. 440, and that the harm to his family, though serious, was not "extraordinary." J.A. 440-41.

> another thing to have to watch your family members go through the same kind of accusation that you have brought on yourself because of your conduct.
>
> [U]nderstanding that you have put your daughter and her family through that, and I suppose that some day the grandchildren may actually learn what it was all about ... is punishment to Mr. Barth unlike that typically faced, or at least, to my knowledge, faced by others in his situation.
>
> He dealt with it by doing what he could to further accept responsibility, that is, by agreeing to the restraining order in return for dropping this with no finding in a year, but it also constitutes in part a harm to the family that has already occurred and will continue to occur simply because of the nature of the chats that took place.
>
> So I am calling this a combination of acceptance, but it is more additional punishment faced by the defendant due to the impact this had on his daughter and her family that I find does take this case out of the heartland.

J.A. 441-42.

The district court then imposed a twelve-month sentence on Barth, including ten months of home detention and two months of incarceration, followed by three years of supervised release. The Government has appealed Barth's sentence, insisting that the downward departure lacked a proper basis under the Sentencing Guidelines.

II.

It is settled that we review a district court's decision to award a downward departure for abuse of discretion. *See Koon v. United States,* 518 U.S. 81, 91, 116 S.Ct. 2035, 135 L.Ed.2d 392 (1996); *United States v. Rybicki,* 96 F.3d 754, 756-57 (4th Cir.1996). *Koon* instructs that a district court's decision to depart will generally be entitled to "substantial deference, for it embodies the traditional exercise of discretion by a sentencing court." 518 U.S. at 98. The deference we accord such decisions reflects the special institutional competence that district courts possess in discerning which cases "fall outside the heartland" of cases governed by the Sentencing Guidelines. *Id.* As *Koon* also advises: "Whether a given factor is present to a degree not adequately considered by the Commission, or whether a discouraged factor nonetheless justifies departure because it is present in some unusual or exceptional way, are matters determined in large part by comparison with the facts of other Guidelines cases." *Id.*

III.

A.

While a sentencing court's decision to depart from the Guidelines generally should not be disturbed, appellate review is not an "empty exercise." *See id.* Downward departures may be reversed on appeal if the sentencing court relies on improper factors, e.g., "discouraged" factors, or if the reviewing court, evaluating the totality of the circumstances, concludes that the case is not so exceptional as to justify departure. *See United States v. DeBeir,* 186 F.3d 561, 566 (4th Cir.1999). Reviewing courts can and will find an abuse of discretion where the "circumstances and consequences of[a] case do not render it sufficiently atypical or extraordinary to remove it from the heartland of cases covered by the applicable guideline." *See id.* at 564.

In *DeBeir,* we reviewed at length, in a not dissimilar factual situation, the permissible and impermissible types of *Koon* departures. The defendant in *DeBeir,* a male of fifty-eight, had pled guilty to travelling in interstate commerce with the intent to engage in a sexual act with a minor.[6] The district court departed three levels on the basis of a combination of factors which either singly or together indicated that a longer sentence would have an adverse effect on DeBeir, "to an exceptional degree." *See id.* at 565.

Like Barth, DeBeir proffered a veritable laundry list of departure bases, including the "collateral consequences of incarceration" on his employment opportunities, his "unique psychological condition," his "unusual susceptibility to abuse in prison," the "impact of negative publicity," an assertion that the crime was "victimless" since the minor was actually an undercover FBI agent, and the defendant's age, extreme remorse, and post- offense rehabilitation effort. We concluded that none of these factors was so unique or extraordinary as to bring the case outside the heartland of similar cases. Judge Motz explained:

> We have studied the record thoroughly, including the parties' fine briefs, and have reviewed the entire complement of factors and circumstances contributing to the district court's departure decision and cannot conclude that any factor or group of factors brings this case outside the norm. The circumstances of this case are far removed from those found exceptional in

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[6] DeBeir had exchanged numerous sexually explicit electronic communications with "Kathy," a federal agent adopting the persona of a fourteen-year-old girl, and the two had eventually arranged a meeting "so that he could teach her about oral sex." 186 F.3d at 564.

> existing case law; even when taken together, they cannot justify a departure.

*Id.* at 573.

Accordingly, we determined that the district court had abused its discretion in sentencing DeBeir, and we reversed. Discussing at length the purposes of the Sentencing Guidelines and their essential goal of eliminating inequality in sentencing, we recognized that a sentencing court may permissibly depart only in "extraordinary cases," and that such "heartland" departure cases are "'extremely rare.'" *Id.* at 566, quoting U.S.S.G. § 5K2.0 (Commentary). As in *DeBeir*, we conclude that the circumstances presented here are neither atypical nor extraordinary, but instead fall squarely within the heartland of child pornography prosecutions.

B.

The Government asserts that, in this case, the district court improperly applied a hybrid theory of downward departure, *i.e.*, "additional punishment," based on the harm already inflicted on Barth's family -- and, consequently, on his conscience -- coupled with Barth's acceptance of responsibility in entering into the New York settlement agreement. While neither of these concerns would justify a downward departure if viewed independently, the court found their cumulative effect sufficient to remove Barth's case from the heartland.[7]

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[7] In effect, the district court here justified its downward departure under § 5K2.0 of the Guidelines, the same ground analyzed -- and rejected -- in *DeBeir*. In the Commentary accompanying § 5K2.0, the Sentencing Commission acknowledged the possibility of an extraordinary case that, because of a combination of [characteristics or circumstances that are ordinarily not relevant to departure], differs significantly from the "heartland" cases covered by the guidelines ..., even though none of the

1.

The critical issue in our review of this sentence relates to the asserted "additional punishment" imposed on Barth as a result of the New York investigation. In this regard, we observe that defendants convicted of child pornography crimes are typically exposed to harsh and shameful *personal* consequences -- including incarceration, impaired job prospects, and social stigma. Indeed, a child pornography defendant should readily expect that he will be investigated and restrained from contact with children. The sentencing court indicated, however, that such consequences would rarely extend to innocent family members as directly as they did in this case, apparently regarding the New York investigation as uniquely devastating. In the court's words: "[U]nderstanding that you have put your daughter and her family through that, and I suppose that some day the grandchildren may actually learn what it was all about . . . is punishment to Mr. Barth unlike that typically faced, or at least, to my knowledge, faced by others in his situation." J.A. 441-42.

According to the Government, this "additional punishment" rationale is unprecedented and legally impermissible. First, it was not the punishment of incarceration, but the defendant's own relevant misconduct which directly caused his family's suffering. Similarly, the Government observes that this "additional punishment" was not only foreseeable, but was a direct and inevitable consequence of Barth's misconduct. It also maintains that when there is such a close nexus between the criminal conduct and the collateral consequence, one may assume that the Guidelines have already taken that consequence into account.

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individual characteristics or circumstances individually distinguishes the case. U.S.S.G. § 5K2.0 (Commentary).

Finally, the Government asserts that, even if the proffered rationale were permissible in some cases, the sentencing court abused its discretion in granting Barth an eight-level downward departure. There was simply nothing in the record to support a claim that Barth was punished any more or differently than others convicted of similar sex offenses. That his own relevant conduct -- indeed his own words -- dragged his family into an investigation is unfortunate, but not unusual. Sex offenders who have frequent contact with children often find that their lives are altered in that respect after conviction.

In response, Barth submits that the "additional punishment" at issue here was neither an inherent nor foreseeable consequence of his crime. We are unconvinced, and we find ourselves in agreement with the Government. Though the investigation of Barth's daughter and son-in-law may have been unusual, there is no reason for Barth to benefit from this anomaly. Presumably, any investigation would devastate the family, even if confined to his own behavior, *i.e.*, even if his daughter's family had not been directly accused. The inconvenience here may have been unusually direct, but the family's suffering was well within the heartland of the crime. While deference is to be accorded the district court, our decisions instruct that heartland departures may be reversed when the defendant's punishment is not atypical or extraordinary in the context of the criminal act and relevant circumstances. *See, e.g., DeBeir, supra; Rybicki,* 96 F.3d at 759 (concluding that job loss occasioned by a defendant's newly acquired status as convicted felon was "far from atypical" and did not merit departure).

2.

The sentencing court also identified a second factor -- Barth's "acceptance of responsibility" -- to support its downward departure on behalf of Barth. However, it is

elementary that acceptance of responsibility is already accounted for under the Guidelines, and cannot serve as the basis for an additional departure unless "present to an exceptional degree or in some other way mak[ing] the case different from the ordinary case where the factor is present." *Koon*, 518 U.S. at 82. Although Barth's consent to the New York restraining order was not compelled, it hardly qualifies as an "extraordinary" acceptance of responsibility.[8] Indeed, given Barth's arrest and his revolting, though false, statements about his granddaughter, his agreement to the restraining order was a fairly minor concession. In our view, it would have been extraordinary if Barth had *not* consented to the restraining order. In short, we view Barth's "acceptance of responsibility" as nothing more than damage control--to be expected under the circumstances.

IV.

We therefore conclude that neither the "additional punishment" which Barth suffered, nor his "acceptance of responsibility," considered individually or collectively, are so unique or extraordinary as to remove Barth's case from the "heartland" of similar cases. Because the downward departure granted to Barth constituted an abuse of discretion, we vacate his sentence and remand for resentencing.

*VACATED AND REMANDED.*

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[8] The sentencing court's invocation of this factor was especially inappropriate since Barth had already received a two-point downward departure for acceptance of responsibility under U.S.S.G. § 3E1.1, and the court had specifically found that Barth's acceptance of responsibility, viewed independently, was not "extraordinary."

**APPENDIX C**

**UNITED STATES COURT OF APPEALS**

**FOR THE FOURTH CIRCUIT**

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**United States of America,**

**Plaintiff-Appellee,**

**v.**

**Gerome Montreal Randall,**

**Defendant-Appellant.**

**United States of America,**

**Plaintiff-Appellee,**

**v.**

**Jeron Rondell Randall,**

**Defendant-Appellant.**

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Nos. 99-4475, 99-4476

215 F.3d 1322, 2000 WL 620311 (4th Cir. (N.C.))

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Submitted April 25, 2000.
Decided May 15, 2000.

Appeals from the United States District Court for the Eastern District of North Carolina, at Greenville. Malcolm J. Howard, District Judge. (CR-95-58-H).

Michael G. Howell, McNeil & Gilbert, Raleigh, NC; Richard L. Cannon, III, Greenville, NC, for appellants.

Janice McKenzie Cole, United States Attorney, Anne M. Hayes, Assistant United States Attorney, J. Frank Bradsher, Assistant United States Attorney, Raleigh, NC, for appellee.

Before MURNAGHAN and MICHAEL, Circuit Judges, and HAMILTON, Senior Circuit Judge.

## OPINION

**PER CURIAM.**

Gerome and Jeron Randall, twin brothers, were convicted in 1996 of federal drug and firearms offenses. On appeal, their convictions under 18 U.S.C.A. § 924(c) (West Supp.1999) (Count Six), for using and carrying a firearm during a drug trafficking crime on October 11, 1995, were reversed, *see United States v. Randall,* 171 F.3d 195 (4th Cir.1999). The sentences under Count Six were vacated, and the cases were remanded for resentencing.

At their joint resentencing, both Gerome and Jeron moved for a downward departure for extraordinary post-sentencing rehabilitation based on their conduct and accomplishments in prison. The government moved for an upward departure in Gerome's case based on Application Note 2 to *U.S. Sentencing Guidelines Manual* § 2K2.4 (1998), the guideline applicable to Count Three, Gerome's second, and remaining, § 924(c) conviction.

Application Note 2 to 2K2.4 provides that, when a defendant is sentenced for a § 924(c) offense as well as for the underlying offense, any enhancement for possession of a firearm under the guideline applicable to the underlying

offense should not be applied. In Gerome's case, this meant that he did not receive a two-level enhancement under USSG § 2D1.1(b)(1). Application Note 2 also encourages an upward departure when (as in Gerome's case), the offense level for the underlying offense, without enhancement for possession of a firearm, results in:

> a guideline range that, when combined with the mandatory consecutive sentence under . . . § 924(c), . . . produces a total maximum penalty that is less than the maximum of the guideline range that would have resulted had there not been a count of conviction under . . . § 924(c) . . . (*i.e.*, the guideline range that would have resulted if the enhancements for possession, use, or discharge of a firearm had been applied).

USSG § 2K2.4, comment. (n. 2). A departure under this guideline may "not exceed the maximum of the guideline range that would have resulted had there not been a count of conviction under . . . § 924(c). . . . *Id.*

Gerome's original sentence (with two § 924(c) convictions) was 535 months; however, on remand, his guideline range was 235-293 months, with a mandatory consecutive 60 month sentence for the remaining § 924(c) conviction, which raised his total maximum sentence to 353 months. Had Gerome received a two- level enhancement for possession of a firearm during a drug offense under § 2D1.1(b)(1) instead of a § 924(c) conviction, his offense level would have increased from 36 to 38 and his guideline range would have been 292-365 months.

The district court agreed that an upward departure under Application Note 2 to § 2K2.4 was warranted in Gerome's case because his total maximum penalty with the

§ 924(c) conviction (353 months) was less than the maximum of the guideline range that would have resulted with a firearm enhancement under § 2D1.1(b)(1) -- 365 months. In addition, the court found that drug dealing in the area had resulted in violence, that Gerome had carried a gun, and that he had once threatened the undercover officer by pointing a gun at him during a drug transaction. The court departed upward by twelve months -- from 293 months to 305 months imprisonment, and also imposed the mandatory 60-month consecutive sentence for Gerome's remaining § 924(c) conviction. His total sentence was 365 months. The court also determined that a § 2D1.1(b)(1) enhancement was appropriate in Jeron's case, which increased his offense level from 38 to 40 and produced a guideline range of 360 months to life. Jeron received a sentence of 366 months. The district court heard argument on the Randalls' motions for a downward departure for extraordinary rehabilitation, but ultimately declined to depart downward in either case.

On appeal, both Gerome and Jeron contend that the district court failed to understand its authority to depart downward for post-sentencing rehabilitation. We find that the court in fact lacked authority to depart on that basis when resentencing the Randalls.

A discretionary decision not to depart is not reviewable on appeal, *see United States v. Brock*, 108 F.3d 31, 33 (4th Cir.1997), but a decision not to depart based on a belief that the court lacks authority to depart is reviewed de novo. *Id.* In *Brock*, we held that exceptional post-offense rehabilitation is a possible ground for departure. *See Brock*, 108 F.3d at 35. However, *Brock* involved a claim of extraordinary rehabilitation made at the initial sentencing, not in a resentencing hearing. At a resentencing, unless the court of appeals' mandate specifically limits the district court to specific issues, resentencing is de novo. *See United States v. Broughton Jones*, 71 F.3d 1143, 1149 n. 6 (4th Cir.1995)

(remand without limitation) (citing *United States v. Bell,* 5 F.3d 64, 67 (4th Cir.1993)); *see also United States v. Apple,* 962 F.2d 335, 337 (4th Cir.1992) (remand instructions limited to specific potential error and defendant's claim of post- sentencing rehabilitation not relevant to that issue). In this circuit, even when the mandate of the appeals court does not limit the issues that may be reconsidered on remand, the district court may only consider relevant evidence "'that it could have heard at the first hearing'" with respect to any particular issue. *Bell,* 5 F.3d at 6 (quoting *United States v. Cornelius,* 968 F.2d 703, 705 (8th Cir.1992)). Thus, rehabilitation which occurs after the initial sentencing will necessarily always be outside the scope of the remand. *See United States v. Sims,* 174 F.3d 911, 913 (8th Cir.1999) (citing *Cornelius* ); *United States v. Warner,* 43 F.3d 1335, 1340 (10th Cir.1994) (citing *Bell* and *Cornelius* ).

A number of circuits have reached the opposite conclusion, holding that post- sentencing rehabilitation may be the basis for a departure upon resentencing, but we do not find these decisions persuasive. *See United States v. Green,* 152 F.3d 1202, 1207-08 (9th Cir.1998); *United States v. Rhodes,* 145 F.3d 1375, 1377-82 (D.C.Cir.1998); *United States v. Core,* 125 F.3d 74, 76-79 (2d Cir.1997); *United States v. Sally,* 116 F.3d 76, 80 (3d Cir.1997). *Sims, Sally,* and *Rhodes* ostensibly rely on *Brock,* but fail to recognize that *Brock* addressed only post-offense rehabilitation that occurred before the first sentencing hearing.[9]

Because the post-sentencing conduct of Gerome and Jeron was not relevant evidence that the district court could have heard at the first hearing concerning any issue, *see Bell,* 5 F.3d at 6, we find that the district court lacked authority to

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[9] *Green* notes that *Brock* determined that a departure may be based on post-offense rehabilitation, see *Green,* 152 F.3d at 1207 & n. 5, and does not cite *Brock* in support of its holding.

consider it as a basis for departure at the resentencing hearing. Consequently, the district court did not abuse its discretion when it decided not to depart.

Next, Gerome argues that the district court abused its discretion by departing upward in his case without finding that his use or possession of a firearm was extraordinary or exceptional, and by relying in part on a forbidden factor -- his use of a firearm on September 7, 1995, which was the basis for his § 924(c) conviction on Count Three.

When the Sentencing Commission has encouraged departure based on a certain factor and the factor is not taken into account under the applicable guideline, the court may depart in its discretion based on that factor. *See Koon v. United States,* 518 U.S. 81, 96 (1996). If the encouraged factor is already taken into account by the applicable guideline, the court may depart "only if it finds that the factor is present to an exceptional degree or in some other way makes the case different from the ordinary case where the factor is present." *Id.* The district court's decision that an encouraged factor has not been adequately taken into account by the applicable guideline is reviewed de novo. *See United States v. Rybicki,* 96 F.3d 754, 758 (4th Cir.1996).[10]

We note first that the rationale for the encouraged departure under Application Note 2 is to avoid sentencing a defendant to a lesser term of imprisonment because he used a gun during a drug offense rather than simply possessed a gun. Any departure pursuant to Application Note 2 will involve use of a gun in some fashion. Therefore, such use of a gun cannot be a factor that the court is forbidden to consider.

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[10] The government argues that the plain error standard of review applies, but Gerome's attorney opposed a departure and thus preserved the issue for appeal.

Moreover, the district court made a factual finding that a departure was warranted in Gerome's case based on the violent nature of crack dealing in the area, Gerome's personal use of firearms, and his implied threat to the undercover officer by pointing his pistol at the officer. We find that the court's explanation for the departure was sufficient.

We therefore affirm the sentences. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

*AFFIRMED.*